MAMAT DAUD & ORS.

v.

THE GOVERNMENT OF MALAYSIA

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
GEORGE SEAH SCJ
MOHD. AZMI SCJ
HASHIM YEOP SANI SCJ
EUSOFFE ABDOOLCADER SCJ
[SUPREME COURT SUIT NO. 1 OF 1986]
29 OCTOBER 1987

CONSTITUTIONAL LAW: *Declaratory orders - Whether s. 298A Penal Code inserted by Amendment Act A549 is invalid as being ultra vires Constitution - Petitioners charged under s. 298A Penal Code (religious disunity offence) - Whether impugned section is legislation on 'Islamic religion' or for 'Public Order', 'Internal Security' and 'Criminal law' - Essence of s. 298A Penal Code.*

CONSTITUTIONAL LAW: *Judicial interpretation - Doctrine of colourable legislation - Application of pith and substance approach of judicial interpretation - Subject matter of offence - s. 298A Penal Code - Whether Parliament acted beyond its legislative competency.*

In this case, pursuant to leave obtained under Article 4 Clause (4) of the Federal Constitution, the petitioners filed their suit for Declaratory Orders to the effect that the new s. 298A of the Penal Code being a section inserted by an Amendment Act, Act A549, in 1983 is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament has no power to make law. The petitioners contended that, having regard to the pith and substance of the section, it is a law which ought to be passed not by Parliament but by State Legislative Assemblies; it being a legislation on Islamic religion according to Article 11 Clause 4(4) and Item 1 of List II, Ninth Schedule. However, the respondent contended that the section is valid as it is a law passed by Parliament on the basis of public order, internal security and also criminal law according to Article 11, Clause (5) and Item (3) and (4) of List I, Ninth Schedule.

The real issue was: who should make this law, the impugned section, Parliament or the State Legislative Assemblies?

Held:

[1] By pitch and substance s. 298A of the Penal Code is a law with respect to a matter with respect to which Parliament has no power to make law and that s. 298A of the Penal Code is invalid and therefore null and void and is of no effect.

[2] Section 298A of the Penal Code is, except for the Federal Territories of Kuala Lumpur and Labuan, invalid as being a law which only a State Legislative Assembly could enact.

[3] Having considered and examined the provisions of s. 298A of the Penal Code as a whole, the Court ruled that it is a colourable legislation in that it pretends to be a legislation on "public order" when in pith and substance it is a law on the subject of religion with respect to which only the States have power to legislate.

[Application allowed by majority. Declaratory orders granted accordingly.]

Cases referred to:

Navinchandra v. Commissioner of Income Tax Bombay City [1955] AIR SC 58
K.C.G. Narayan Deo v. State of Orissa [1953] AIR SC 375
Attorney-General for Ontario v. Reciprocal Insurers [1924] AC 328
East Union (M) Sdn. Bhd. v. Government of the State of Johore & Anor. [1980] MLJ 143
Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli (No. 2) [1967] 1 MLJ 46
Attorney-General for Ontario & Ors. v. Canada Temperance Federation & Ors. [1946] AC 193
Canadian Federation of Agriculture v. Attorney-General for Quebec & Ors. [1951] AC 179
Regina v. Harrold [1971] 19 DLR (3d) 471
Gallagher v. Lynn [1937] AC 863
Prafulla Kumar Murkherjee v. Bank of Commerce Ltd., Khulna [1947] 74 IA 23
State of Bombay v. Narottamdas [1951] AIR SC 69
B.R. Shankaranarayana v. State of Mysore [1966] AIR SC 1571
Russell v. The Queen [1882] 7 App Cas 829
Hodge v. The Queen [1883] 9 App Cas 117
Gibbons v. Ogden [1824] 22 US 1
John Deere Plow Company Limited v. Wharton [1915] AC 330
Public Prosecutor v. Datuk Harun bin Haji Idris & Ors. [1976] 2 MLJ 116
The Commonwealth of Australia & Anor. v. The State of Tasmania & Ors. (the Franklin Dam Case) [1983] 158 CLR 1
Huddart Parker & Co. Proprietary Limited v. Moorehead [1908] 8 CLR 330
W. & A. McArthur Ltd. v. State of Queensland [1920] 28 CLR 530
Herald and Weekly Times Ltd. v The Commonwealth [1966] 115 CLR 418
Grannall v. Marrickville Margarine Proprietary Limited [1955] 93 CLR 55
Bank of New South Wales v. Commonwealth [1948] 76 CLR
Re Application of Tan Boon Liat @ Allen [1976] 2 MLJ 83; [1977] 2 MLJ 18
Canadian Federation of Agriculure v. Attorney-General For Quebee & Ors. [1951] AC 179
Saumur v. City of Quebec and Attorney-General for Quebec [1953] 4 DLR 641

Legislation referred to:

British North America Act 1867 [Canada], ss. 91, 92, (13)
Criminal Procedure Code, ss. 173A, 294.
Federal Constitution, arts. 4, (3), (4), 11(4), (5), 74, (1), (2), (4), 77, 128(1)(a), Federal List, Item 4(h), State List, Items 1, 3(a)
Penal Code, ss. 81, 295, 296, 297, 298, 298A
Administration of Islamic Law Enactment 1955 (Terengganu), ss. 2, 21(1), 88, 89, 142A, 142B, 149

For the petitioners - G. Sri Ram (Wan Abdul Mutalib & Hj. Sulaiman Abdullah with him); M/s. Sri Ram, Zulkifly & Kumar
For the respondent - T. Selventhiranathan, SFC (Nur Aini Zulkiflee, FC with him)
For the Malaysian Bar Council (holding a watching brief) - Joseph Chia

JUDGMENT

Mohd. Azmi SCJ:

We have allowed this application by majority (Tan Sri Datuk Hashim Yeop Sani SCJ and Tan Sri Dato' Seri Eusoffe Abdoolcader SCJ dissenting), and we now proceed to give our reasons why the declarations sought should be granted.

Pursuant to leave obtained under Article 4 Clause (4) of the Federal Constitution, the petitioners filed their suit for declaratory orders to the effect that the new s. 298A of the Penal Code is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament has no power to make law.

Each of the petitioners is being charged for an offence under the impugned section for doing an act which is likely to prejudice unity amongst persons professing the Islamic religion. They are alleged to have acted as unauthorised Bilal, Khatib and Imam at a Friday Prayer held on 13 May 1983 at Kampong Kenaga, Wakaf Tapai in the District of Kuala Terengganu, without being so appointed under the Terengganu Administration of Muslim Law Enactment 1955 - the State Law relating to the administration of all matters concerning the religion of Islam and the religious Courts. The appointment of Bilal, Khatib and Imam is governed by ss. 88 and 89 of the Terengganu Enactment, but apparently there is no specific punishable section in the State Law to deal with persons who contravene these two Sections, except for convening or taking part in the performance of Friday Prayers in unauthorised building (s. 142A), for unauthorised Khutbah (s. 142B) and for contempts of religious authorities (s. 149).

The impugned section was enacted by Parliament *vide* the Penal Code and Criminal Procedure Code (Amendment) Act 1983 (Act A549), and the crucial issue before the Court is whether the said section is *ultra vires* Article 74 Clause (1) of the Federal Constitution, since the subject matter of the legislation is reserved for the State Legislatures and therefore beyond the legislative competency of Parliament. Mr. Sri Ram for the petitioners contends that the impugned section is null and void because in pith and substance it is a law on the subject of religion on which Parliament is not competent to legislate except with regard to the religion of Islam in the Federal Territories of Kuala Lumpur and Labuan. Our Parliament is not a legislative body with unlimited legislative power, and the sole right to legislate on Islamic religion under Item (1) of the State List is given to the State Legislatures. On the other hand, Mr. Selventhiranathan, Senior Federal Counsel submits that Parliament has the necessary constitutional competence to enact the law since the subject matter is not in fact "religion", but "Public Order" under Item 3(a), and "civil and criminal law and procedure and the administration of justice, including creation of offences in respect of any of the matters included in the Federal List, or dealt with by federal law" under item 4(h) of the Federal List. In short, since "Public Order" is in the Federal List, Parliament can create offences in respect of it without being inhibited by Item (1) of the State List.

In so far as it is relevant to this proceeding, Item (1) of the State List read with Article 74 Clause (2) provides that a State Legislature may make laws "except with respect to the Federal Territories of Kuala Lumpur and Labuan", on matters of:

- Islamic law ...
- mosques or any Islamic public places of worship ...
- creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; ...
- The control of propagating doctrines and beliefs among persons professing the religion of Islam,
- The determination of matters of Islamic law and doctrine ...

The subject of Islamic religion, both general and specific, conferred by Item (1) is all-embracing, particularly when considered in the light of Article 74 Clause (4) which provides:

Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

Further, in relation to missionary activities of any religion amongst Muslims, Article 11 Clause (4) provides that:

> State law and in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

In determining whether s. 298A in pith and substance falls within the class of subject matter of "religion" or "public order", it is the substance and not the form or outward appearance of the impugned legislation which must be considered. The impugned statute may even declare itself as dealing with religion, but if on investigation of the legislation as a whole, it is in fact not so, the Court must so declare. Conversely, it is not sufficient for the impugned legislation to declare itself as dealing with public order, if in substance, it seeks to deal directly or indirectly with religion or religious law, doctrine or precept, for no amount of cosmetics used in the legislative make-up can save it from being struck down for pretending to be what it is not. The object, purpose and design of the impugned section must therefore be investigated for the purpose of ascertaining the true character and substance of the legislation and the class of subject matter of legislation to which it really belongs. But the Court should not be concerned with the motives which induced the legislature to exercise its power, nor should the Court be concerned with the draconian nature of the legislation or with the fact that it contravenes s. 81 of the Penal Code by creating penal offences without the requirement of *mens rea*. Although every item in the three legislative Lists in the Ninth Schedule must not be read in a narrow or restricted sense, the application of this rule must of necessity be conditioned by the subject matter of the impugned legislation itself (see *Navinchandra v. Commissioner of Income Tax Bombay City* [1955] AIR SC 58). On the scope and meaning of the doctrine of colourable legislation B.K. Mukherjee J had this to say in *K.C.G. Narayan Deo v. State of Orissa* AIR [1953] SC 375:

> It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of *bona fides* or *mala fides* on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power *vide Cooley's Constitutional Limitations*, Vol. 1 p. 379. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by which could not be challenged on the ground of incompetency, and a legislature which enjoys only a limited or a qualified jurisdiction.
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> If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears on proper examination, to be a mere pretence or disguise.

Applying the above principles, we shall now proceed to examine the provisions of s. 298A with some strictness (as was done by the Privy Council in *Attorney-General for Ontario v. Reciprocal Insurers* [1924] AC 328), the real substance of the legislation for the purpose of determining whether it is a colourable legislation, as alleged by the petitioners. The impugned section is divided into eight sub-sections. Sub-sections (1) and (2) are in the following terms:

(1) Whoever by words, either spoken or written, or by signs, or by visible representations, or by any act, activity or conduct, or by organising, promoting or arranging, or assisting in organising, promoting or arranging, any activity or otherwise in any other manner-

(a) causes, or attempts to cause, or is likely to cause disharmony, disunity, or feelings of enmity, hatred or ill-will; or

(b) prejudices, or attempts to prejudice, or is likely to prejudice, the maintenance of harmony or unity, on grounds of religion, between persons or groups of persons professing the same or different religions, shall be punished with imprisonment for a term of not less than two years and not more than five years.

(2) Sections 173A and 294 of the Criminal Procedure Code shall not apply in respect of an offence under sub-section(1)

Pausing here for a moment, these two sub-sections notwithstanding their draconian nature and their apparent repugnancy to the provision of s. 81 of the Penal Code would give the appearance that the legislation is on the subject matter of the Federal List, on the principle of giving the term "public order" as liberal an interpretation as possible. This is so even if we ignore the essential ingredient of any offence in sub-section (1), which requires "on ground of religion" the resultant disharmony, disunity or feelings or enmity, hatred or ill-will; or the resultant prejudice to the maintenance of harmony or unity. The gist of the offence is the doing of anything on the ground of religion which is likely to cause disunity or disharmony between people professing the same religion or different religions, because under Article 11 Clause (5) freedom of religion does not authorise any act contrary to general law relating to public order, public health or morality. The wording of the sub-section (1) is so wide that it comprehends almost every act which can be construed as causing or likely to cause disharmony or disunity, or prejudicing the maintenance of harmony or unity on ground of religion. Although the manner of the commission of the acts has been minutely spelt out, the nature of the acts themselves which is intended to be prohibited requires particularisation, as has been implicitly done in all the original offences under Chapter XV of the Penal Code *viz.* s. 295 (Injuring or defiling a place of worship with intent to insult the religion of any class of persons), s. 296 (Disturbing a religious assembly), s. 297 (Trespassing on burial places etc.) and s. 298 (Uttering words or making gestures with deliberate intent to wound the religious feelings of any person). In a rather unusual style, Parliament has particularised the acts or conducts by means of three presumptions of law as contained in sub-sections (3), (4) and (5), which are irrebuttable, there being no burden on the part of the accused to prove the contrary. Without these three sub-sections, the rest of the section would be quite useless. Thus, in reality although presented in the form of illustrations, s. 298A is aimed at prohibiting the acts or conducts as set out in these three sub-sections which read:

(3) Where any person alleges or imputes in any manner specified in sub-section (1), -

(a) that any other person, or any class, group or description of persons, professing any particular religion:

(i) has ceased to profess that religion; or

(ii) should not be accepted, or cannot be accepted, as professing that religion; or

(iii) does not believe, follow, profess, or belong to, that religion; or

(b) that anything lawfully done by any religious official appointed, or by any religious authority established, constituted or appointed, by or under any written law, in the exercise of any power, or in the discharge of any duty or in the performance of any function, of a religious character, by virtue of being so appointed, established or

constituted, is not acceptable to such person, or should not be accepted by any other person or persons, or does not accord with or fulfill the requirements of that religion, or is otherwise wrong or improper,

he shall be presumed to have contravened the provisions of sub-section (1) by having acted in a manner likely to cause disharmony disunity or feelings or enmity, hatred or ill-will, or likely to prejudice the maintenance of harmony or unity, between persons or groups or persons professing the religion referred to in the allegation or imputation.

(4)(a) Where, on any ground of a religious character, any person professing any particular religion uses for burial or cremation of any human corpse a place other than one which is lawfully used for such purpose by persons professing that religion, he shall be presumed to have contravened the provisions of sub-section (1) by having acted in a manner likely to cause disharmony, disunity or feelings of enmity, hatred or ill-will, or likely to prejudice the maintenance of harmony or unity, between persons or groups of persons professing that religion.

(b) Where any person, on any ground of a religious character counsels, advises, instigates, urges, pleads with or appeals or propagates to, or in any manner or by any means calls upon, whether directly or indirectly, any other person or persons professing any particular religion-

(i) to use for burial or cremation of any human corpse a place other than one which is lawfully used for such purpose by persons professing that religion; or

(ii) not to use for burial or cremation of any human corpse any place which is lawfully used for such purpose by persons professing that religion; or

(iii) not to use for worship any place which is lawfully used for such purpose by persons professing that religion,

he shall be presumed to have contravened the provisions of sub-section (1) by having acted in a manner likely to cause disharmony, disunity or feelings of enmity, hatred or ill-will, or likely to prejudice the maintenance of harmony or unity, between persons or groups of persons professing that religion or different religions.

(5) Where any person who is not a religious official appointed, or a religious authority established, constituted or appointed, by or under any written law purports to exercise any power, or to discharge any duty, or to perform any function, of a religious character, being a power, duty or function which can be lawfully exercised, discharged or performed only by a religious official appointed, or a religious authority established, constituted or appointed, by or under any written law, he shall be presumed to have contravened the provision of sub-section (1) by having acted in a manner likely to cause disharmony, disunity or feelings of enmity, hatred or ill-will, or likely to prejudice the maintenance of harmony or unity, between persons or groups of persons professing the same or different religions.

In our view, all these specified acts and conducts have nothing to do with "public order" as envisaged by the Federal List; but they are directly concerned with religious matters or religious affairs. As far as Islamic religion is concerned, they come under the classification of either the general subject of Islamic law, or the specific subjects of creation and punishments of offences by persons professing the religion of Islam against precepts of that religion, or the control of propagating doctrines and beliefs amongst persons professing the religion of Islam, or the determination of matters of Islamic law and doctrines, all of which are reserved expressly for legislation by the State Legislatures. Surely, the subject matter of whether a person or group of persons has ceased to profess his or their religion is a purely religious matter, and to create an offence for making an imputation concerning such matter is well within the legislative competence of the State Legislatures and not that of Parliament.

So is the act of refusing to bury the dead in a cemetery allocated for people professing a particular religion. It is the same with the act of performing the function of authorised religious officials by a person who is not so appointed. The fact that the Administration of Muslim Law Enactment of the States has yet to provide specifically for punishment against such acts, cannot in the absence of express provision in the Constitution confer Parliament with the power to legislate over such religious matters, and that is why the Muslim Courts (Criminal Jurisdiction) Act 1975 has been enacted to confer on state religious Courts jurisdiction over offences against precepts of the religion.

Except for sub-section (7), the remaining subsections are not really important for the purpose of analysing and investigating the subject matter of the impugned section. But for the sake of completeness, all the three remaining subsections are reproduced below:

> (6) The foregoing provisions of this section shall not apply to:
>
> (a) anything done by any religious authority established, constituted or appointed by or under any written law and conferred by written law with power to give or issue any ruling or decision on any matter pertaining to the religion in respect of which the authority is established, constituted or appointed; or
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> (b) anything done by any person which is in pursuance of, or which accords with, any ruling or decision given or issued by such religious authority, whether or not such ruling or decision is in writing and if in writing, whether or not it is published in the *Gazette*.
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> (7) It shall not be a defence to any charge under this section to assert that what the offender is charged with doing was done in any honest belief in, or in any honest interpretation of, any precept, tenet or teaching of any religion.
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> (8) If in any proceedings under this section any question arises with regard to the interpretation of any aspect of, or any matter in relation to, any religion, the Court shall accept the interpretation given by any religious authority referred to in subsection (6), being a religious authority in respect of that religion.

In our view, sub-section (7) apart from dispensing with *mens rea*, is a legislation which involves either "Islamic law" or "the determination of matters of Islamic law or doctrine". Any attempt to control the right of Muslims to a particular belief or interpretation must, according to the Constitution, be done by legislation passed by the State Legislatures because Article 74 confers legislative power only to the State Legislatures to deal with Islamic law and the determination of Islamic law and doctrine amongst Muslims. State law on such subjects can for example, be found in s. 21(1) of the Terengganu Administration of Islamic Law Enactment (State Enactment No. 4 of 1955) which provides:

> In making and issuing any ruling upon any point of Islamic Law or a doctrine in the manner hereinbefore provided the Mufti, shall ordinarily follow the orthodox tenets of the Shafeite Sect:
>
> Provided that if the Mufti considers it to be in the interests and welfare of the Muslim community he may issue the Fetua within the tenets of any of the four sects:

"The four sects" are defined by s. 2 to mean the Shafeite, Hanafi, Maliki and Hambali Sects.

In our opinion, by enacting a law denying Muslims of the defence of honest belief in and honest interpretation of Islamic law and doctrine which can only be enacted by the State Legislatures, Parliament has acted beyond its legislative competency. The provision of sub-section (7) is the very soul of the whole impugned section and its invalidity would reduce the apparent draconian piece of legislation to a toothless and lame tiger. This sub-section wipes out whatever flicker of doubts that may be entertained that religion and not public order is the real substance of the impugned section. From our investigation, the claim that

religion is merely incidental to the legislation cannot hold water. We therefore find neither Item 3(a) nor Item 4(h) of the Federal List forms the substance of the subject matter of the impugned section. Nor can the impugned section take refuge under Article 11 Clause (5) of the Constitution, as it simply cannot pass the subjective test of being a legislation relating to public order, public health or morality.

Having considered and examined the provisions of s. 298A as a whole, we rule that it is a colourable legislation in that it pretends to be a legislation on "public order", when in pith and substance it is a law on the subject of religion with respect to which only the States have power to legislate under Article 74 and 77 of the Constitution. Mr. Sri Ram has by letter and also in his submission indicated to the Court that the petitioners' application does not cover the Federal Territories of Kuala Lumpur and Labuan as far as the religion of Islam is concerned. As there is no discussion or submission on this particular point, it is only proper that we should express no opinion as to the extent of the validity of the impugned section in the two territories.

For reasons discussed, we allow the first two orders sought in the suit, *viz.* (1) a declaration that s. 298A of the Penal Code is a law with respect to a matter with respect to which Parliament has no power to make law, and (2) a declaration that s. 298A of the Penal Code is invalid and therefore null and void and of no effect. On the basis of the application before us, this ruling shall not apply to the Federal Territories of Kuala Lumpur and Labuan. We also order that this ruling should take effect from the date of this order, namely 13 October 1987.

Salleh Abas LP:

In this petition the Court is asked to make a ruling whether or not s. 298A of the Penal Code, being a section introduced by an Amendment Act of Parliament (Act A549) in 1983, is invalid as being *ultra vires* the Constitution. It is the contention of the petitioners that it is so, because, having regard to the pith and substance of the section, it is a law which ought to be passed not by Parliament but by State Legislative Assemblies; it being a legislation on Islamic religion according to Article 11 Clause (4) and Item 1 of List II, Ninth Schedule. The respondent, on the contrary, contends that the section is valid because it is a law passed by Parliament on the basis of public order, internal security and also criminal law according to Article 11 Clause (5) and Item (3) and (4) of List I, Ninth Schedule.

In this petition we are not concerned with the desirability or undesirability of the legislation but only with one question that is: who should make this law, Parliament or the State Legislative Assemblies? For the purpose of this judgement there is no need for me to quote the impugned section as it is fully set out in the joint judgment of my learned brothers Tan Sri Azmi and Datuk George Seah, with which I wholly agree.

Complicated as the section may seem, the offence created by its sub-section (1) is in essence the doing of an act on the ground of religion, which act is likely to cause disunity or affect or prejudice harmony between people professing the same religion or different religions. For the purpose of this judgment I refer to the offence as a religious disunity offence. Although the scope of the section appears to be so wide as to encompass almost anything, in reality, the aim of the legislation is to make a number of acts and conducts, listed out in sub-sections (3), (4) & (5) punishable under the sub-section. These prohibited acts are:

(i) an imputation that a person or groups of persons have ceased to profess his or their religion;

(ii) an imputation that a person or groups of persons are not or cannot be accepted as professing his or their religion;

(iii) an imputation that a person or groups of persons do not believe in his or their religion any more;

(iv) a rejection of any act done by an established religious authority or officer as being contrary to the requirements of that particular religion;

(v) a refusal to use for burying the dead the normal and usual burial ground allocated for people professing that particular religion;

(vi) propagating on the ground of religion for the use as a burial ground of a place other than that allocated for the devotees of that particular religion or not to use such allocated burial ground;

(vii) propagating not to use the usual place of worship;

(viii) performing the function of established religious official by a person who is not empowered to do so.

Any one of these prohibited acts constitutes a religious disunity offence because by means of presumption under sub-sections (3), (4) and (5), the doer of the prohibited act is irrebuttably presumed to have contravened the provisions of sub-section (1) in that he has "acted in a manner likely to cause disharmony, disunity or feelings of enmity, hatred or ill-will, or likely to prejudice the maintenance of harmony or unity, between persons or groups of persons professing the religion referred to in the allegation or imputation." Not only does the presumption dispense with factual proof of likelihood of disunity but also narrows down the generality of the offence to those specific prohibited acts. In effect, the presumption defines what a religious disunity offence under sub-section (1) is. The scope of the offence is further delineated by the provisions of sub-sections (6), (7) and (8) which are as follows:

(i) the offence does not apply to an established religious authority or religious officer;

(ii) honest belief in, and honest interpretation of the religious precepts, tenets and principles is not a defence;

(iii) only the interpretation of the religious precepts, tenets and principles by the established authority of that religion will be accepted by the Court.

Thus the purpose of these three subsections is to ensure conformity of religious tenets, precepts and practices to those adopted by an established religious authority.

There is however no statutory definition of established religious authority anywhere in the impugned section, and, moreover, the wording of sub-section (1) is very wide. It is thus impossible to comprehend the applicability of the offence without reference to these specific cases of prohibited acts enumerated above, each of which, as I have said earlier, constitutes the very offence itself.

There is of course no objection to this indirect method of defining an offence, i.e., first by stating the offence in a general term and later specifying what acts would constitute the offence. But, where there is a constitutional limitation upon the subject matter of the legislation, such indirect method is not free from being questioned. What is objectionable, as far as I could see here, is that any of these prohibited acts is referable to, and could be understood only in the context of, the practices and ceremonies carried out recently by certain groups of Muslims, including the petitioners, who rightly or wrongly according to the religion of Islam, refuse to conform to the practices allowed by the established religious authority. Instead, they adopted different practices. Surely a legislation to prevent them from carrying out such practices amounts to a legislation upon Islamic religion, on which only States have legislative competence. If this impugned section is, as claimed by the respondent, based upon

the Parliamentary power to legislate on public order, one would question why did the legislature adopt this indirect method of legislation? Why can't the section be enacted in such a way that the religious disunity offence is defined directly to consist of any one of those prohibited acts? Is it not much easier and simpler? It appears that the indirect method was resorted to, because it is an attempt to hide the reality of legislating upon an impermissible subject or matter behind the general facade of constitutionality. This to me seems to be a colourable legislation, a proper case for the application of the pith and substance approach of judicial interpretation.

I accept that to allow any Muslim or groups of Muslims to adopt divergent practices and entertain differing concepts of Islamic religion may well be dangerous and could lead to disunity among Muslims and, therefore, could affect public order in the States. But the power to legislate in order to control or stop such practices is given to States as could be seen from Article 11 Clause (4):

> (4) State law and in respect of the Federal Territory, federal law may control or restrict the propagation of any religious doctrine or belief among peoples professing the religion of Islam.

It is they alone which can say what should be the proper belief, rule and concept of Islamic religion or what should not be its interpretation and what should be the rule in a particular given situation or case. Clause (4) is a power which enables States to pass a law to protect the religion of Islam from being exposed to the influences of the tenets, precepts and practices of other religions or even of certain schools of thought and opinions within Islamic religion itself.

Further, whatever doubt that may linger as to the true nature of the impugned section, it is completely dispelled by sub-section (7), which enacts in no uncertain terms that it is not a defence for any person charged with the offence under sub-section (1) to say that he did the prohibited act "in an honest belief in, or in an honest interpretation of any precept, tenet or teaching of any religion." Surely, a legislation to deny a Muslim from holding a certain view or to prevent him from adopting a practice consistent with that view is a legislation upon religious doctrine. In its applicability to the religion of Islam, the impugned section must, in my view, be within the competence of State Legislative Assemblies only. See Item 1 and List II of the Ninth Schedule to the Constitution. I wonder why no course was taken to have this impugned section authorised or even ratified by them. If this were done, the section would have been beyond question.

Viewed in its proper perspective, the impugned section, in so far as its application to Muslims is concerned, is a law, the object of which is to ensure that Islamic religion practised in this country must conform to the tenets, precepts and practices allowed by States. For example, it will not become an offence if any of the prohibited acts is done by an authorised religious officer, or conforms to such act, but, on the other hand, it will be an offence if that act is done by any other person notwithstanding the fact that the act was done in accordance with honest belief and honest interpretation of the precept, tenet, and teaching of Islam. In enacting this impugned section I do not think that Parliament can really rely on its powers to legislate on public order because the exercise of such power comes into a direct conflict with State powers to legislate on, and control, the practices of Islamic religion.

In conclusion, I agree with the submission of Mr. Sri Ram, Counsel for the petitioners that by pith and substance s. 298A is, except for the two Federal Territories of Kuala Lumpur and Labuan, invalid as being a law which only a State Legislative Assembly could enact.

I have given some thought as to whether or not the impugned section could be severed, so that sub-sections (1) and (2) could be saved. However, since the structure of the section as a whole is all interconnected, I do not consider that severance is possible.

Hashim Yeop Sani SCJ (dissenting):

The new s. 298A of the Penal Code was inserted by an amendment act, Act A549 in 1983. This section was amended by another amendment act, Act A614 on 30 May 1985 which amendment provided for a mandatory punishment of imprisonment of not less than two years and not more than five years. The amendment also excluded the application by the Courts of s. 173A and s. 294 of the Criminal Procedure Code.

Section 298A of the Penal Code is a long winded provision which appears under Chapter XV of the Penal Code with the heading "Of Offences Relating to Religion". Basically s. 298A deals with the creation of an offence arising from an act or conduct likely to cause disharmony, disunity or feeling of enmity, hatred or ill-will or act or conduct likely to prejudice the maintenance of harmony and unity between persons of the same or different religion.

The petitioners seek for a declaration that s. 298A of the Penal Code is invalid on the ground that Parliament has no power to pass the law or *ultra vires* Article 74(1) of the Constitution being in excess of the legislative power of Parliament. Article 4 of the Constitution enables a subject to ask for a **specific** declaration that a particular law is invalid on the ground mentioned in Clause (3) of the Article. See also *East Union (M) Sdn. Bhd. v. Government of the State of Johore & Anor.* [1980] MLJ 143, *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli* (No. 2) [1967] 1 MLJ 46, 49 and *Abdul Karim bin Abdul Ghani @ Karim Ghani v. The Legislative Assembly of The State of Sabah* Supreme Court Civil Application No. 21 of 1987.

The words "on grounds of religion" in the new s. 298A of the Penal Code would seem to indicate that to constitute an offence under that provision the act or conduct complained of must have some connection with a religion or the practice of a religion. This is dealt with in sub-section (1). Sub-section (2) enforces a mandatory prison sentence by disallowing the Courts from exercising their discretion under s. 173A and s. 294 of the Criminal Procedure Code. Sub-sections (3), (4) and (5) give specific illustrations of acts or conduct which shall by law be presumed to be contrary to subsection (1). Sub-section (6) exempts acts of established religious authorities and acts of others in pursuance of any ruling or decision of an established religious authority. Sub-section (7) excludes the defence of honest belief or honest interpretation of any precept of a religion. Sub-section (8) directs the Court to give credence to an interpretation of a religious principle or precept given by an established religious authority in preference to any other interpretation.

The question posed is not whether the provisions of s. 298A of the Penal Code are draconian. The question is only whether Parliament has power to enact such a law.

The crux of the applicants' argument would appear to be that s. 298A of the Penal Code is in pith and substance a legislation on matters of religion and that by virtue of Article 74 of the Constitution and Item 1 of the State List in the Ninth Schedule to the Constitution, Parliament has no legislative competence to enact such a law (except for the Federal Territories). Except in the Federal, Territories Parliament has no power to legislate a law to cover Islamic law, or law relating to personal and family of persons professing the religion of Islam; nor has Parliament any power to enact law with respect to mosques or any public places of worship or to create any punishment for offences of a person professing the religion of Islam against the precepts of that religion except in regard to matters included in the Federal List.

Firstly it is to be noted that there is no mention of any specific religion in s. 298A. Thus the provisions will embrace an act or conduct of a Muslim, Hindu, Buddhist or Christian. Secondly, the act or conduct must be one which causes or likely to cause disharmony, disunity, or feelings of enmity, hatred or ill-will or prejudices, or attempts to prejudice, or is likely to prejudice, the maintenance of harmony or unity between persons or groups of persons professing the same or different religions. Thirdly it would appear that the act or conduct must have some connection with the practice or purported practice of a religion.

When viewed in the light of criminal law the nature of s. 298A as creating a criminal offence can easily be grounded on Item 3(a) of the Federal List (public order) and Item 4(h) of the Federal List (creation of offences). Those items confer ample powers on Parliament to enact legislation on public order and civil and criminal law and procedure and to create offences. The words used in Item 4 of the Federal List are "civil and criminal law and procedure". The power conferred by Item 4 of the Federal List is wide and is subject only to creation of offences in respect of matters included in the State List as stated in Item 9 of the State List in the Ninth Schedule to the Federal Constitution. Article 74(4) of the Constitution provides that where general as well as specific expressions are used in the list generality of the former shall not be taken to be limited by the latter. The words "civil and criminal law and procedure" when read with Article 74(4) of the Constitution would thus clearly vest Parliament with the power to enact the law.

Although it deals with acts connected with religion the real object of s. 298A is the preservation of public order. The true test is always to see the real subject matter of the legislation - see *Attorney-General for Ontario & Ors. v. Canada Temperance Federation & Ors.* [1946] AC 193 and *Canadian Federation of Agriculture v. Attorney-General for Quebec & Ors.* [1951] AC 179.

Section 298A of the Penal Code is the kind of legislation as envisaged by Article 11(5) of the Constitution:

Article 11(5) reads as follows:

> This Article does not authorise any act contrary to any general law relating to public order, public health or morality.

The right of every person to profess and practise his religion is restricted by Clause (5) of Article 11 of the Constitution in that the right conferred does not authorise any act contrary to "any general **law** relating to public order, public health or morality". The **law** referred to in that clause is a law which seeks to preserve "public order", "public health" and/or "morality".

In *Regina v. Harrold* [1971] 19 DLR (3d) 471 the subject of challenge was the City of Vancouver anti-noise by-law. The accused was a member of a religious group who was convicted under the by-law for being in a group chanting transcendental sounds to the accompaniment of drums and cymbals on the streets of Vancouver. On appeal it was held that the by-law could not apply to the religious group in so far as it extended to prohibit them from carrying out their *bona fide* religious activities. On further appeal it was however held that the conviction should be restored and that the law was of general application and was not in any way directed to religious freedom or interference and all persons should comply with the by-law.

When the true test is applied it can be seen that s. 298A is not law on Islamic religion or any other specific religion or the personal law of any person; nor is it a law with respect to mosques or other places of worship. It is not a law on the creation and punishment of offences of persons professing the religion of Islam or for that matter any religion. Above all it should not be regarded as a law on the propagation of religious doctrines and beliefs.

I have no doubt in my mind that s. 298A of the Penal Code is valid and I so declare.

E. Abdoolcader SCJ (dissenting):

There is before us a suit by the three petitioners, who face charges in the Magistrate's Court in Hulu Terengganu under s. 298A of the Penal Code (FMS Cap. 45), instituted with leave under Article 4(3) and (4) of the Federal Constitution in the original jurisdiction of this Court under Article 128(1)(a) thereof for two declarations to the conjoint effect that that section which was inserted in the Penal Code by an amendment effective on 20 February 1983 to provide for and create the offence, in the words of the marginal note thereto, of 'causing, etc. disharmony, disunity, or feelings of enmity, hatred or ill-will, or prejudicing, etc. the maintenance of harmony or unity, on grounds of religion' is unconstitutional and void except with respect to the Federal Territories of Kuala Lumpur and Labuan (the preclusion stemming from the specification to that effect in item 1 in the State List in the Ninth Schedule to the Constitution), on a contention of its constitutional infirmity by reason of Parliament's lack of legislative competence for its enactment.

Shorn of tautology and concisely put, the respective contentions *posited in casu* are to this effect: It is the petitioners' case that s. 298A is in pith and substance a law upon a subject in regard to which Parliament has no power to legislate except with respect to the Federal Territories and that it is colourable legislation in that it encompasses in essence a matter reserved for State legislation under item 1 in the State List in so far as it affects or appertains to the religion of Islam. The respondent in refutation contends that the section in question is in pith and substance a law relating to public order as well as criminal law within the ambit of Items 3 and 4 in the Federal List. The crux and core of the conundrum connoted would therefore seem to revolve around the question of the true nature and character of s. 298A and whether it is such that in effect and substance it purports to deal with matters pertaining to the religion of Islam which would only be within the competence of State legislatures.

Turning now to the basic principles of law involved in a consideration of the question posed for determination in this case: In a federal structure which is based upon the distribution of legislative powers between the Central or Federal legislature (Parliament) and Provincial or State legislatures, the powers of the legislatures are limited by the Constitution. A legislative act would be unconstitutional and invalid if not warranted by the items of legislative power in the appropriate legislative list. When a controversy arises whether a particular legislature is not exceeding its own and encroaching on the other's constitutional power, the Court has to consider the real nature of the legislation impugned, its pith and substance, to see whether the subject dealt with is in the one legislative list or in the other. When a legislature purports to enact legislation with reference to a particular head of legislative power, it has to comply with the conditions circumscribing that power. A nominal compliance with such conditions while the real attempt is to circumvent would be regarded as a colourable exercise of the legislative power and will be struck down as unconstitutional.

It is a consequence of the doctrine of pith and substance that once a law 'in pith and substance' falls within a legislative entry, an incidental encroachment on an entry in another List does not affect its validity. Thus in *Gallagher v. Lynn* [1937] AC 863 it was held by the Privy Council (at p. 870) that the impugned statute was in pith and substance one to protect the health of the inhabitants of Northern Ireland and, though incidentally it affected trade, it was not passed 'in respect of' trade and was therefore not subject to attack on that ground. Similarly, in *Prafulla Kumar Mukherjee v. Bank of Commerce Ltd., Khulna* [1947] 74 IA 23 the Judicial Committee held that the Bengal Money Lenders Act, 1940 was in pith and substance a law in respect of 'money lending and money lenders' (entry 27, List II, Government of India Act, 1935) and was valid even though it trenched incidentally on 'promissory notes' and 'banking' (entries 28 and 31, List I in the Act).

This rule envisages the examination of the legislation in question as a whole to ascertain its

true nature and character in order to determine into what List it falls. Once it is found that in pith and substance a law falls within the permitted field, any fortuitous transgression by it on a forbidden field does not affect the competence of the legislature to enact the law. The Supreme Court of India held in *State of Bombay v. Narottamdas* AIR [1951] SC 69 (at p. 96) that effect is not the same thing as subject matter and that if a State Act, otherwise valid, has effect on a matter in one List, it does not cease to be a legislation with respect to an entry in either of the other two Lists.

The doctrine of pith and substance introduces a degree of flexibility into the otherwise rigid scheme of distribution of powers, the *raison d'etre* underlying the rule being that if every legislation were to be invalid, however slight or incidental the encroachment on to the other field, then the power of each legislature would be drastically circumscribed to deal effectively with the subjects entrusted to it. The doctrine of colourable legislation has no application if the legislature concerned has constitutional authority to pass a law in regard to a particular subject, whatever the reasons behind it may be. The real purpose of a legislation may be different from what appears *ex facie* but it would be colourable legislation only if the real object is not attainable by the legislature because it lies beyond its constated power.

The doctrine of colourable legislation has reference to the competence and not to the motives or good or bad faith of the legislature. The motives of a legislature in making a law are irrelevant (*B.R. Shankaranarayana v. State of Mysore* AIR [1966] SC 1571), and it is not for the Courts to divine and scrutinise the policy which led to the enactment of a law falling within the constitutional authority of the legislature concerned. I would on this aspect of the matter stress the point I have adumbrated by referring to the judgment of the Privy Council in *Russell v. The Queen* [1882] 7 App. Cas. 829 which declared (at pp. 839-840) that

> The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs.

In applying the true nature and character test, the principle would appear to be that for the purposes of the distribution of legislative powers, the statutory provision in issue is to be classified by that feature of its meaning which is judged the dominant or most important one in that respect. It would, however, be a fallacy to view the pith and substance rule and its variant or concomitant, the true nature and character test, in isolation without considering them on a broader basis in the context and against the backdrop of the double aspect doctrine. The Privy Council declared as far back as 1883 that "subjects which in one aspect and for one purpose fall within s. 92 (of the British North America Act 1867, now the Constitution Act 1867 of Canada) may in another aspect and for another purpose fall within s. 91" (*Hodge v. The Queen* [1883] 9 App. Cas. 117 (at p. 130)). This doctrine is reflected in Marshall CJ's statement in *Gibbons v. Ogden* [1824] 22 US 1 (at p. 90) that

> all experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical.

The categories of legislative power specified in the Federal and State Lists must in some circumstances inevitably overlap, and therefore a challenged law with features of meaning relevant to both Federal and State categories of laws has to be classified by that feature of it deemed most important for purposes of the division of legislative powers designated in the Constitution. Viscount Haldane LC in delivering the judgment of the Judicial Committee of the Privy Council in *John Deere Plow Company Limited v. Wharton* [1915] AC 330 observed (at p. 338), in referring to ss. 91 and 92 of the British North America Act 1867 which provide for the subjects of Dominion and Provincial legislation respectively, that

> The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme.

The starting point for the approach to the question of the nomothetic validity of legislation must necessarily be the presumption of constitutionality. As I said in my judgment in *Public Prosecutor v. Datuk Harun bin Haji Idris & Ors.* [1976] 2 MLJ 116 (at p. 117) in enunciating the principles involved in any such exercise,

> there is a presumption - perhaps even a strong presumption - of the constitutional validity of the impugned section with the burden of proof on whoever alleges otherwise.

This passage was cited with approval by the High Court of Australia in one of its most important constitutional law decisions in our time, if not since the creation of the federal system of government in Australia, *The Commonwealth of Australia & Anor. v. The State of Tasmania & Ors. (the Franklin Dam Case)* [1983] 158 CLR 1 (at p. 165). The contention advanced for the petitioners in this suit evinces a confusion in perception and a myopic view of the legislative powers entrusted to the Federal and State legislatures in their respective spheres delineated in the Constitution, and the presumption of the constitutional legitimacy of s. 298A has not in my view been displaced in any way.

No consideration has apparently been given by either side to what I consider to be a vital aspect of the matter in the presentation of their respective arguments, *scilicet*, the enabling powers of legislation specified in Article 74 of the Constitution which stipulates that Parliament or the Legislature of a State may severally as specified therein make laws **with respect to** the divers matters enumerated in the three Lists set out in the Ninth Schedule thereto. The Constitution commits to Parliament and the Legislature of a State, as the case may be, the power to make laws 'with respect to', that is to say, 'on the subject of' the itemised powers (*Huddart Parker & Co. Proprietary Limited v. Moorehead* [1908] 8 CLR 330 (at p. 409)). The question is

> in each case what is the **subject** of the legislation - what subject is the Act 'with respect to' what it effects - not what things or operations it may indirectly affect (*W. & A. McArthur Ltd. v. State of Queensland* [1920] 28 CLR 530 (at p. 565)).

As Kitto J said in *Herald and Weekly Times Ltd. v. The Commonwealth* [1966] 115 CLR 418 (at p. 436), it is the answer to the question what

> is the law really doing by (its) operation which a scrutiny of its effect in the variety of cases to which it applies according to its terms ... that shows whether the law is really one 'with respect to' the relevant subject of power.

In that case the High Court of Australia pointed out that a law qualifying a statutory power to relax a prohibition was a law with respect to the subject of the prohibition, even if the qualification gave it the character of a law on a subject outside the power, but the prohibition itself however must relate to a subject of legislative power.

The words 'with respect to' ought never to be neglected in considering the extent of a legislative power conferred by Article 74 of the Constitution for what they require is a relevance to or connection with the subject assigned to the appropriate legislature (*Grannall v. Marrickville Margarine Proprietary Limited* [1955] 93 CLR 55 (at p. 77)).

> A power to make laws 'with respect to' a specific subject is as wide a legislative power as can be created. No form of words has been suggested which would give a wider power

(*Bank of New South Wales v. Commonwealth* [1948] 76 CLR 1 (at p. 186)). A catenation of cases show that the term 'with respect to' manifests a degree of flexibility in legislation on the subject heads of power and does not project legislative powers as lean powers simply to regulate the very subject head itself, and this phrase has been used to extend the subject power into peripheral areas without however transgressing the parameters of the double aspect doctrine and trenching upon a forbidden field of legislative power.

Adverting then to specifics in relation to the instant matter: Clause (5) of Article 11 of the Constitution assertively stipulates that that article which provides for freedom of religion does not authorise any act contrary to any general law relating to public order, public health or morality. It is now necessary to examine and consider the Federal and State Lists in the Ninth Schedule to the Constitution to ascertain the items relevant for the purpose of determining the validity of s. 298A. In the Federal List, item 3 deals with internal security generally and includes in para. (a) thereof public order. I would pause to observe that I have given an exegesis on public order and what it involves in my judgment in *Re Application of Tan Boon Liat @ Allen* [1976] 2 MLJ 83 which was affirmed by the Federal Court ([1977] 2 MLJ 18). Item 4 in the Federal List refers *inter alia* to criminal law and procedure and includes in para. (h) thereof the creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law.

Item 1 in the State List provides specifically for matters relating to the religion of Islam including *inter alia* the creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion, **except in regard to matters included in the Federal List.** The preclusion clause must clearly envisage and give effect to the power of Parliament under Items 3 and 4 in the Federal List to legislate in regard to public order and criminal law and procedure and under para. (h) of Item 4 for the creation of offences in respect of any of the matters included in the Federal List or dealt with by Federal law, unlike the specific exception made in relation to Islamic personal law in para. (e)(ii) of Item 4 {anent} the matters specified in sub-paragraph (i) thereof.

Item 1 in the State List however excludes its application to the Federal Territories of Kuala Lumpur and Labuan as the subject matter of that item in respect of the Federal Territories comes within the Federal legislative power under Item 6(e) in the Federal List. When it comes to different aspects of personal law affecting persons other than those professing the religion of Islam, in the field of such areas as family law, marriage, divorce, adoption and succession, Federal law provides for these matters under Item 4(e)(i) in the Federal List even though it might perhaps be arguable, predicated on the premise that the matter of religion other than Islam (which is specifically provided for in Item 1 in the State List) comes within the residual power of legislation of the legislature of a State under Article 77 of the Constitution, that in doing so Parliament may appear to trench into the sphere of religious precepts and practice, but para. (k) of Item 4 in the Federal List which provides for the ascertainment of Islamic Law and other personal laws for the purposes of federal law would militate against any such argument, quite apart from the likely eventuation of the double aspect doctrine in the circumstances.

Chapter XV of the Penal Code which bears the heading 'Of Offences Relating To Religion' comprises of ss. 295 to 298, and s. 298A was added thereto to specify a distinct criminal offence affecting public order in relation to activities grounded on religion. I would think that any argument that s. 298A is impeachable on the basis that it is colourable legislation and primarily pertains to religion would equally affect ss. 295 to 298 as well, but there has been no such suggestion and Mr. Sri Ram for the petitioners in answer to me seeks to distinguish s. 298A from the rest of Chapter XV on the contention that it lacks a mental

element in view of the statutory presumptions it contains and more particularly by reason of the provisions of sub-section (7) thereof which enacts that it shall not be a defence to any charge under that section to assert that what the offender is charged with doing was done in any honest belief in, or in any honest interpretation of, any precept, tenet or teaching of any religion, and that the section accordingly deprives an accused person of the defence open to him under s. 81 of the Penal Code.

Quite apart from the fact that it is legislatively competent to provide for the exclusion of a particular provision of law in its application in defined circumstances, I cannot see how s. 81 of the Penal Code affects the position, as it only negates an offence in respect of any act 'done without any criminal intention to cause harm, **and** in good faith **for the purpose of preventing or avoiding other harm to person or property'**. Without a provision on the lines of sub-section (7), the substantive offence enacted in sub-section (1) of s. 298A would be rendered wholly edentulous, impotent and sterile, as the defence of honest belief or honest interpretation would invariably succeed, understandably in regard to matters of faith, conscience and personal conviction and belief. Section 298A moreover is not confined solely to the Islamic religion and does not create an offence in relation to its tenets, precepts, practice and propagation, and the several States have indeed enacted laws for the administration of Islamic law; the section applies to all persons irrespective of the religion they profess and in my view it clearly relates to the dominant aspect of public order consequent upon activities exercised on grounds of religion and is directed at ensuring the tranquil observance of all faiths without disruption of the public weal in consonance with the postulate enacted in Article 11(5) of the Constitution.

Mr. Sri Ram's reliance on the decision of the Privy Council in *Canadian Federation of Agriculture v. Attorney-General for Quebec & Ors.* [1951] AC 179 is in my view not apt and somewhat misplaced. Each case must, as Mr. Sri Ram agrees in answer to me, turn on its own facts and circumstances and the scope and nature of the legislation under scrutiny. *Canadian Federation* turned on the interaction of the pertinent provisions of the British North America Act 1867 and the relative dependency of its several parts specifically in relation to the validity of Dominion legislation enacted with the avowed object of protecting and encouraging the dairy industry and its impact on the Provincial legislative sphere.

Mr. Selventhiranathan, Senior Federal Counsel, for the respondent in support of his stance refers us to *Regina v. Harrold* [1971] 19 DLR (3rd) 471 in which the accused, a member of a religious group which would gather in the city streets and chant sounds to the accompaniment of a small drum and a few cymbals, was convicted of violating a City of Vancouver anti-noise by-law. The British Columbia Court of Appeal in upholding the conviction applied the dictum of Cartwright J in his dissenting judgment in *Saumur v. City of Quebec and Attorney-General for Quebec* [1953] 4 DLR 641 and held (at p. 479) that

> The right to freedom of religion does not permit anyone, acting under the umbrella of his religious teachings and practices, to violate the law of the land, whether that law be federal, provincial or municipal.

It was accordingly held that a municipal anti-noise by-law may also prohibit religious activities though aimed primarily at factories and noisy mufflers. I do not think that this case is exactly opposite either, as the *ratio decidendi* of the decision would seem to pertain basically to interference with the right to freedom of religion whereas in the matter before us the question is whether there has been an illusory exercise of federal legislative power in enacting the impugned statutory provision.

An authority as directly in point as one can get in the circumstances of this case is the decision of the Supreme Court of Canada in *Walter v. Attorney-General for Alberta; Fletcher v. Attorney-General for Alberta* [1969] 3 DLR (2d) 1 which surprisingly was not dealt with or referred to by counsel on either side. The question in issue in these two appeals was the Constitutional validity of the Communal Property Act 1955 of the Province of Alberta. The facts which were not in dispute were that the appellants, other than the Fletchers, were Hutterians, members of a pacifist religious sect, who sought to purchase land in Alberta from the owners thereof including the Fletchers, and it was conceded that the lands sought to be acquired would be held in common as defined in the Act and that the operation of the Act prevented the acquisition of the lands. The appellants, other than the Fletchers, formed part of a religious community which based its community life and its holding of property on religious principles. The Act defined 'colony' to include *inter alia* by specific denomination Hutterites or Hutterian Brethren and Doukhobors, the latter also being a pacifist sect, and 'communal property' was defined to mean in essence land held by a colony as communal property. The Alberta law limiting the communal holding of land so as to control the expansion of Hutterite colonies was upheld as in relation to land use being a subject of exclusive provincial legislation under s. 92(13) of the British North America Act 1867, notwithstanding its special impact on Hutterite religious practice.

The submission of the appellants in *Walter* was that the Act was legislation in respect of religion and in consequence was beyond the legislative powers of a provincial legislature. The respondent contended that the Act was legislation in respect of property in Alberta, controlling the way in which land was to be held, by regulating the acquisition and disposition of land to be acquired by colonies to be held as communal land. The trial Judge held that in pith and substance the Act related to land tenure in the province and was therefore *intra vires* the legislature of the Province of Alberta under s. 92(13) of the British North America Act in relation to property and civil rights in the Province; this judgment was sustained on appeal, and the appeal *a quo* to the Supreme Court of Canada was dismissed. Martland J, who delivered the judgment of the Supreme Court, in disagreeing with the submission by the appellants that the Act was aimed at preventing the spread of Hutterite colonies in Alberta, that, because the maintenance of such colonies was a cardinal tenet of the Hutterite religion, the Act sought to deal with religion, and that the subject of religion was within the exclusive jurisdiction of the Parliament of Canada, said (at pp. 8-9):

> The purpose of the legislation in question here is to control the use of Alberta lands as communal property. While it is apparent that the legislation was prompted by the fact that Hutterites had acquired and were acquiring large areas of land in Alberta, held as communal property, it does not forbid the existence of Hutterite colonies. What it does is to limit the territorial area of communal land to be held by existing colonies and to control the acquisition of land to be acquired by new colonies which would be held as communal property. The Act is not directed at Hutterite religious belief or worship, or at the profession of such belief. It is directed at the practice of holding large areas of Alberta land as communal property, whether such practice stems from religious belief or not. The fact that Hutterites engage in that practice was the circumstance which gave rise to the necessity for the Legislature's dealing generally with the holding of land as communal property, but that does not mean that legislation controlling the holding of land in that way is not in relation to property in the Province of Alberta.
>
> ... The fact that a religious group upholds tenets which lead to economic views in relation to land holding does not mean that a provincial legislature, enacting land legislation which may run counter to such views, can be said, in consequence, to be legislating in respect of religion and not in respect of property.

> Religion, as the subject-matter of legislation, wherever the jurisdiction may lie, must mean religion in the sense that it is generally understood in Canada. It involves matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship. But it does not mean freedom from compliance with provincial laws relative to the matter of property holding ...
>
> In *Carnation Co. Ltd. v. Quebec Agricultural Marketing Board* 67 DLR (2d) 1 at p. 14, [1968] SCR 238 at p. 252, reference was made to the distinction between legislation 'affecting' the appellant's interprovincial trade and legislation 'in relation to' the regulation of trade and commerce. In my opinion, the legislation in question here undoubtedly affects the future expansion and creation of Hutterite colonies in Alberta, but that does not mean it was enacted in relation to the matter of religion. The Act is in relation to the right to acquire land in Alberta, if it is to be used as communal property, and, in consequence, it is within provincial jurisdiction under s. 92(13).

I consider *Walter* to be an extremely pertinent and important authority and almost directly to the point in relation to the suit before us, and a wholesale transposition of the text of the judgment in that case which I have cited with the appropriate commutation of the requisite legislative heads of power involved to the question presented in the instant case would *mutatis mutandis* make it equally and effectively apply in my view to come plumb within the four corners of the present discussion with an identical conclusion in respect of the matter for determination and illustrate the dominant aspect of public order and criminal law in s. 298A.

For the reasons I have ventilated and in the light of the law I have discussed, I had no hesitation whatsoever at the conclusion of argument in this matter in holding that s. 298A was validly enacted by Parliament and that the declarations sought by the petitioners must be refused and the suit accordingly dismissed.

Also found at [1988] 1 CLJ 11